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# In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 400

LAWRENCE GOLDBERG, PETITIONER

*v.*

UNITED STATES OF AMERICA AND ATOMIC ENERGY COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

### OPINION BELOW

The memorandum opinion of the court of appeals (Pet. 12) and the opinion and order of the Atomic Energy Commission (Ex. F)[1] are not yet reported.

### JURISDICTION

The order of the court of appeals dismissing the proceedings was entered June 5, 1962, and the petition

[1] "Ex." refers to the exhibits filed by the respondents in the court of appeals. These exhibits were submitted with briefs opposing the motion to stay. The respondents filed an additional exhibit with their brief in support of the motion to dismiss the proceeding. This consists of an extract from the transcript of the Commission proceedings and will be referred to as "Tr."

for certiorari was filed September 4, 1962. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Petitioner, identifying himself as a taxpayer and a citizen, sought judicial review of an order of the Atomic Energy Commission authorizing construction of a nuclear power reactor. The statutes allow judicial review of administrative action only at the instance of a person aggrieved or one suffering legal wrong because of that action. Respondents filed a motion to dismiss alleging that petitioner lacked the requisite standing to obtain judicial review.

The question presented is whether the court of appeals correctly determined that it did not have jurisdiction to review the Commission order.

## STATUTES INVOLVED

Section 189, Atomic Energy Act of 1954, 71 Stat. 579, 42 U.S.C. 2239, provides in pertinent part:

> (a) * * * The Commission shall hold a hearing after thirty days notice and publication once in the Federal Register on each application under section 2133 or 2134(b) of this title for a license for a facility, and on any application under section 2134(c) of this title for a license for a testing facility.
>
> (b) Any final order entered in any proceeding of the kind specified in subsection (a) of this section shall be subject to judicial review in the manner prescribed in sections 1031–1042 of Title 5, and to the provisions of section 1009 of Title 5.

Section 4, Judicial Review Act of 1950, 64 Stat. 1130, 5 U.S.C. 1034, provides:

> Any party aggrieved by a final order reviewable under this Act [§ 1031 et seq. of this title] may, within sixty days after entry of such order, file in the court of appeals, wherein the venue as prescribed by section 3 hereof [§ 1033 of this title] lies, a petition to review such order. Upon the entry of such an order, notice thereof shall be given promptly by the agency by service or publication in accordance with the rules of the agency. The action in court shall be brought against the United States. The petition shall contain a concise statement of (a) the nature of the proceedings as to which review is sought, (b) the facts upon which venue is based, (c) the grounds on which relief is sought, and (d) the relief prayed. * * *

Section 10(a), Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009(a), provides:

> (a) Right of review—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

## STATEMENT

On November 8, 1961, the Atomic Energy Commission published a notice of hearing on the application of Philadelphia Electric Company for a construction permit authorizing the company to construct a nuclear reactor at Peach Bottom, York County, Pennsylvania (Ex. A). Among the issues set for the hearing were (Ex. A, pp. 1, 2):

> 1. Whether the applicant has submitted sufficient information to provide a reasonable assurance that a utilization facility of the general type proposed in the application can be constructed and operated at the proposed location without undue risk to the health and safety of the public.
>
> * * * * *
>
> 5. Whether the construction of the reactor will be inimical to the common defense and security or to the health and safety of the public.

Procedures for intervention in the proceeding were set out in the notice of hearing (Ex. A, p. 2).

A copy of this notice of hearing was mailed to the petitioner on November 28, 1961, at his request. In a letter dated December 5, 1961, counsel for the staff of the Atomic Energy Commission informed petitioner, in response to his query, that he might file a petition to intervene as a party in the proceeding pursuant to Section 2.705 of the Commission's Rules of Practice or, in the alternative, enter a limited appearance pursuant to Section 2.731.[2] A copy of the Commission's Rules of Practice was included with this letter.

A public hearing was held on December 18, 1961. Petitioner, a resident of Philadelphia, was present and stated that he wished to make a limited appearance in order to present an unsworn statement as provided by Section 2.731 of the Commission's rules.[3]

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[2] The Commission's Rules of Practice in effect at the time of the hearing are set forth in 10 C.F.R. Part 2.

[3] The Commonwealth of Pennsylvania, an intervenor, was represented at the hearing by counsel, who "expressed concern

Both the hearing examiner and counsel representing the Atomic Energy Commission explained to petitioner the choice between a limited appearance for the purpose of making a statement and formal intervention as a party. Petitioner stated that he did not want to intervene as a party, and he then read an unsworn statement which attacked the administration of the Atomic Energy Act as unconstitutional because, *inter alia*, "the Act as administered has been contrary to the best interests of the people of the United States, is inimical to the long range security of the United States, violates provisions of the Constitution providing for equal protection of the laws, * * * transcends the intent of Congress and fails to promote the general welfare as directed by the Constitution" (Tr. 6). He protested against the government's give away of atomic energy technology to the electric utilities (*id.* at 6, 7).

On February 2, 1962, the hearing examiner authorized issuance of a construction permit (Ex. B) and stated that, in accordance with the Commission's rules, a petition to review his initial decision might be filed within 20 days.

On February 23, 1962, petitioner, by telegram, submitted a petition to review the initial decision and to intervene as a party in the proceedings. Identifying himself as "a member of the public affected by the application for a construction permit," petitioner stated in the telegram that he wished to present testimony on the issue of the effect of the construction of this reactor on the "common defense and security

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about public health and safety considerations relating to the proposed facility". (Ex. B, p. 2).

[and] the health and safety of the public * * * as well as certain constitutional questions * * *" (Ex. E. p. 2). The Commission considered and denied the motion stating in its order that to allow intervention would constitute "an abuse of discretion" (Ex. F).[4] The initial decision became final on March 5, 1962.

Petitioner then filed a petition to review the decision and a motion to stay "all proceedings" pending the determination of the petition in the Court of Appeals for the Third Circuit. The petition for review contained no allegation of aggrievement. It asserted, *inter alia,* that the issuance of the permit to the applicant violated the antitrust laws because a combination of 52 utility companies with the applicant in a research and development corporation tends "towards a private monopoly"; that the issuance of the permit violates various provisions of the Atomic Energy Act and constitutes an "unlawful delegation of legislative authority"; and that the construction of the reactor "will be inimical to the common defense and security

[4] In so doing, the Commission noted that the motion to intervene was not timely and had not been served on the other parties to the proceeding, as required by the Commission's rules. On February 6, 1962, the applicant had moved to waive the 20 day waiting period in order that the initial decision might constitute the "final action" of the Commission and a construction permit issue (Ex. C). The Commonwealth of Pennsylvania and the applicant averred that they would not file petitions for review of the initial decision. By order dated February 21, 1962, the motion to waive the waiting period had been granted and the initial decision became "immediately effective" on that date (Ex. D). The Commission reserved the right to certify the record, on its own motion, for final decision before March 5, 1962, on which date the initial decision would become final.

and to the health and safety of the public" (Pet. for Review, pp. 4–6).

On May 8, 1962, the motion for stay was denied (Pet. 11). The Philadelphia Electric Company (which had been granted leave to appear as a party in the judicial proceeding) and the respondents, Atomic Energy Commission and the United States, filed motions to dismiss the proceeding on the ground that petitioner was not a "party aggrieved" or a "person suffering legal wrong * * * or adversely affected or aggrieved" as required by the statutes authorizing judicial review of administrative action and therefore lacked standing to seek review of the administrative determination. In a memorandum filed at oral argument in the court of appeals, petitioner set forth additional reasons why his petition for review should be granted, alleging that since he resided within 70 miles of the proposed construction site, his health and safety would be impaired by any unforeseen accident.

The court of appeals granted the motions to dismiss on the ground of lack of jurisdiction (Pet. 12).

## ARGUMENT

The final orders of the Atomic Energy Commission are subject "to judicial review in the manner prescribed in sections 1031–1042 of Title 5, and to the provisions of section 1009 of Title 5" (42 U.S.C. 2239(b)). The statutory provisions referred to confer standing to obtain judicial review on "any party aggrieved by a final order," 5 U.S.C. 1034, and on "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within

the meaning of any relevant statute," 5 U.S.C. 1009(a). Petitioner, who has characterized his relationship to the administrative action as that of a "member of the public" (Pet. 6), does not have the requisite standing and therefore the court of appeals properly determined that it lacked jurisdiction to review at his request.

Petitioner has not suffered a "legal wrong" as comprehended by Section 10(a) of the Administrative Procedure Act. It is well settled that a citizen and taxpayer, absent any direct or threatened impact on his rights and alleging only a general wrong inflicted on him as a member of the general public, has no standing to attack governmental action. *Alabama Power Company* v. *Ickes,* 302 U.S. 464; *Massachusetts* v. *Mellon,* 262 U.S. 447. Furthermore, although the statutes authorizing judicial review at the behest of a "person aggrieved" have substantially enlarged the number of persons entitled to challenge administrative action,[4] this Court has stressed repeatedly that the injury giving rise to the grievance must be direct and substantial. Thus, in *Columbia Broadcasting System* v. *United States,* 316 U.S. 407, 422, the Court, in holding that CBS was a person "adversely affected" by the Federal Communications Commis-

[4] Compare *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118 (private power companies lack standing to enjoin governmental competition), with *Federal Communications Commission* v. *Sanders Bros Radio Station*, 309 U.S. 470 (existing station licensee is "adversely affected" by grant of license to a competitor within the meaning of a statute conferring standing to seek judicial review of agency action on a person adversely affected by the agency action).

sion's chain broadcasting regulations, pointed out that although the challenged regulations were not directed at the appellant and did not compel or prohibit action by it, "the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations." In *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 477, the Court conceded that although economic or financial injury to a competitor would not be a proper issue before the administrative agency, this would be a "sufficient interest" to confer standing to review the agency action on one injured in this manner. It has never been suggested that one whose only relationship to the subject of the administrative action was that of a citizen and a taxpayer has the direct and substantial interest necessary to obtain review of an administrative action. Moreover, a "naked assertion" of a grievance is insufficient: factual allegations detailing the nature of the appellant's interest affected by the administrative action are necessary. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 219 F. 2d 729, 731 (C.A. 3), certiorari denied, 349 U.S. 945. Petitioner's general allegations are insufficient to meet this standard. See also *Lynchburg Gas Co.* v. *Federal Power Commission*, 284 F. 2d 756 (C.A. 3); *United States Cane Sugar Refiners Ass'n.* v. *McNutt*, 138 F. 2d 116 (C.A. 2).

Contrary to petitioner's assertion, *International Union of Electrical, R. & M. Workers* v. *United States*, 280 F. 2d 645 (C.A.D.C.), reversed on other grounds, 367 U.S. 396, is not in conflict with the de-

cision of the court below and petitioner's reliance on it is misplaced. There, the court of appeals held that the petitioners, labor unions, were "persons aggrieved" by the grant of a construction permit by the Atomic Energy Commission for a nuclear reactor. The unions, which had intervened and became parties in the proceedings before the Commission, claimed that the grant of a construction permit for an allegedly unsafe reactor would depress the value of their real estate in the area and impair the value of collective bargaining contracts. The court held that because of the threatened economic injury to the unions they were persons "aggrieved," and entitled to judicial review, citing this Court's opinion in the *Sanders* case (280 F. 2d 645, 646).

In none of petitioner's allegations, which changed content at every stage of the proceedings, can there be found a claim of a similarly direct personal interest in the outcome of the proceedings. Petitioner's statement at the public hearing held by the Atomic Energy Commission dealt solely with the alleged "give away" of atomic energy technology and similar broad arguments addressed to the general administration of the Atomic Energy Act. In the telegram to the Commission seeking review of their order granting the construction permit petitioner asserted in general terms that he wished to present testimony regarding the "health and safety of the public" in addition to "certain constitutional questions." In the petition for review in the court of appeals, petitioner did not allege any aggrievement but elaborated on the general constitutional and economic policy issues (see pp. 5–6,

*supra*) and merely repeated *in haec verba* the assertion that the agency action was inimical to the "health and safety of the public." At oral argument, petitioner belatedly asserted that residence within 70 miles of a nuclear reactor would be detrimental to his health and safety in case of accidents.[5] The court's ruling upon this tardy and tenuous allegation of a grievance, without any supporting facts, presents no question warranting review by this Court.

## CONCLUSION

The order of dismissal is clearly correct and presents no substantial question. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1962.

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[5] In his petition for certiorari, petitioner is identified as residing within 70 miles of the site of the proposed reactor but the relationship which this bears to the question of his standing to attack the Commission's action is only vaguely referred to as "living within the area affected as to health and safety by the grant of the permit." (Pet. 3, 6).

U.S. GOVERNMENT PRINTING OFFICE 1962